

*In the Matter of Wilfred Gray*  
DOP Docket No. 2005-453  
**(Merit System Board, decided December 1, 2004)**

Wilfred Gray, a Lead Poisoning Inspector with the City of Newark, represented by Eldridge Hawkins, Esq., requests a hearing on the appeal of his removal, effective June 30, 2003, on disciplinary charges.

The pertinent facts of this matter are as follows. On June 20, 2003, the appellant was arrested for terroristic threats in violation of *N.J.S.A.* 2C:12-3 and possession of a weapon for an unlawful purpose in violation of *N.J.S.A.* 2C:39-4.<sup>1</sup> By Preliminary Notice of Disciplinary Action (PNDA) dated June 24, 2003, the appellant was advised that he was being indefinitely suspended, pending the outcome of the criminal charges. The appellant was afforded a departmental hearing in accordance with *N.J.A.C.* 4A:2-2.7(a)1, and he was served with a Final Notice of Disciplinary Action (FNDA) upholding the indefinite suspension on August 8, 2003.<sup>2</sup> Subsequently, by PNDA dated April 26, 2004, the appellant was advised that the appointing authority was seeking his removal on charges of conduct unbecoming a public employee and other sufficient cause. From the record, it appears that these disciplinary charges stemmed from the appellant's arrest on April 22, 2004 for defiant trespass, as well as repeated complaints from business owners and co-workers regarding the appellant's disrespectful and unprofessional conduct while performing his job duties. A departmental hearing was conducted on April 30, 2004, and the appellant was removed, effective June 30, 2003, via FNDA dated June 23, 2004. By letter dated July 2, 2004, the appellant, through his attorneys, initially appealed his removal to the Merit System Board (Board).

A review of Department of Personnel (DOP) records reflects that the appellant was provisionally appointed to the title of Sanitary Inspector, pending open-competitive examination procedures, effective February 22, 1999. At the time of his appointment, an incomplete eligible list, containing the names of two eligibles, existed. In this regard, the eligible list for Sanitary Inspector (M9117W), City of Newark, promulgated on September 3, 1998 and expired on September 2, 2001. Prior to the appellant's provisional appointment, one permanent appointment was made from this list on September 3, 1998. Prior to the announcement of another open-competitive examination for the title of Sanitary Inspector, the appellant was provisionally appointed to the title of Lead Poisoning Inspector, pending open-competitive examination procedures, effective May 29, 2000. The appellant was admitted to the Lead Poisoning Inspector (M1322B), City of Newark, examination, and his name appeared on the resultant eligible list, which promulgated on August 24, 2000 and expired on August 23, 2003. While the appellant

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<sup>1</sup> Both of the charged crimes constitute crimes of the third degree.

<sup>2</sup> The present status of these criminal charges is not clear from the record. Both parties agree that the criminal charges were dismissed on procedural grounds in or about September 2003. However, it appears that there were subsequent motions by the Municipal Prosecutor's Office in Newark to re-open the criminal matter, and the appointing authority suggests that the matter was appealed to the Superior Court, Appellate Division.

appeared tied for the first position with two other eligibles on the August 25, 2000 certification of that eligible list, he was not appointed permanently to the position. It is noted that "Request for Personnel Action" forms reflecting both of the appellant's provisional appointments were signed by the appellant and the appointing authority.

To demonstrate that he held permanent status in his positions and is entitled to a hearing regarding his removal, the appellant initially relies on *N.J.S.A.* 26:3-26, which provides that "[n]o health officer, inspector or employee holding a license issued in the name of the State Department of Health, after five years' consecutive service in the employ of a local board or regional health commission, shall be removed from office or reduced in pay or position except for just cause and after public hearing." In addition, the appellant submits a copy of the City of Newark's Employee Handbook, which includes the statement that "[a]s a City employee, you are subject to the rules and regulations of the [New Jersey] Department of Personnel." The appellant submits various other documents, which he contends demonstrate his permanency, including a Notification of Eligibility from the DOP for the open-competitive examination for Lead Poisoning Inspector (M1322B), City of Newark, a Notification of Certification demonstrating that his name was certified from the above eligible list on August 25, 2000, and a Report on Progress of Probationer reflecting that his work performance was satisfactory for the period of February 22, 1999 to May 2, 1999, his "working test period." The appellant also relies on the appointing authority's provision of PNDAs and FNDAs when instituting major disciplinary action against him as evidence of his permanency. Finally, the appellant submits a copy of an application, on which he listed his "present permanent title" as "Senior Sanitary Inspector/Lead Inspector/Risk Assessor." It is noted that the application presented was filed for the promotional examination for Chief Sanitary Inspector (PM0484D), City of Newark, which had a closing date of April 22, 2002. DOP records indicate that the appellant was sent a Notification of Ineligibility for this promotional examination on June 12, 2002, which advised the appellant that he was ineligible because he lacked permanent status in a title in the competitive division.

It is noted that the appointing authority has not presented any arguments or documentation regarding the status of the appellant's employment for the Board's review.

## **CONCLUSION**

In the instant matter, the appellant requests a hearing on the merits of his removal from employment. *N.J.S.A.* 11A:2-6 empowers the Board to render a final administrative decision, after a hearing, on appeals concerning permanent career service employees who have been removed from employment, suspended or fined as prescribed in *N.J.S.A.* 11A:2-14, demoted for disciplinary reasons, or terminated at the end of their working test periods for unsatisfactory work performance. *See also N.J.A.C.* 4A:2-2.1(a). *N.J.S.A.* 11A:4-13 and *N.J.A.C.* 4A:4-1.1(a) provide that regular appointments to the competitive division of the career service shall be made upon examination, certification, and successful completion of a working test period. Thus, in order to be entitled to a hearing in an appeal of major disciplinary action, an employee serving in a title which is allocated to the competitive division of the career service, as is the case here, must meet the

minimum qualifications for the title, take and pass a competitive examination, and be certified to the appointing authority to fill a vacancy in the title. Moreover, once certified, the employee must be reachable for appointment in accordance with the “Rule of Three” and be selected by the appointing authority to fill the vacancy. Finally, the employee must successfully complete a working test period in the title. *N.J.S.A.* 11A:4-15 and *N.J.A.C.* 4A:4-5.1, *et seq.*

In the instant matter, it is clear that the appellant never achieved or was entitled to permanent status as a Sanitary Inspector. The appellant was provisionally appointed to this title on February 22, 1999, and there is no record that the appellant ever took a competitive examination for this title. Moreover, the appellant makes no claim that he ever filed for, took, or passed an open-competitive examination for the title of Sanitary Inspector. While the appellant submits a document suggesting that he successfully completed a working test period in this title, the fact that the appointing authority prematurely subjected him to this final step in the examination process does not confer permanent status upon the appellant. Further, it must be noted that the appellant and the appointing authority signed a “Request for Personnel Action” form, reflecting that the appellant’s appointment to the title of Sanitary Inspector was provisional, pending open-competitive examination procedures. Thus, the appellant cannot now claim that he was unaware of or intentionally misled regarding the status of his employment. *Cf. Kyer v. City of East Orange*, 315 *N.J. Super.* 524 (App. Div. 1998) (“[I]t is no solution to leave remediless the well-qualified, experienced, high-performing, long-term provisional employee who is unaware that her position is not permanent, [and] who in all likelihood would have easily achieved permanency but for the municipal negligence.” *Id.* at 533.)

Similarly, it is clear that the appellant never achieved permanent status in the title of Lead Poisoning Inspector. In this regard, the appellant and the appointing authority signed a “Request for Personnel Action” form, reflecting that his appointment to this title was provisional, pending open-competitive examination procedures. The appellant’s awareness of the provisional status of his appointment is further demonstrated by the fact that he applied for and took an open-competitive examination for the title of Lead Poisoning Inspector shortly after his provisional appointment. Thus, he was aware of the necessity of this step in order to attain permanent status in his position. While DOP records reflect that the appellant was admitted to the examination, appeared on the Lead Poisoning Inspector (M1322B), City of Newark, eligible list, and his name was certified to the appointing authority on August 25, 2000, there is simply nothing in the record to suggest that the appellant was permanently appointed from this list. Rather, on the only certification from the subject eligible list, the appointing authority permanently appointed the two other eligibles appearing on the certification. Moreover, there is no documentation in the record that the appellant ever successfully completed a working test period in this title. The appellant also received a Notification of Ineligibility for the promotional examination for Chief Sanitary Inspector (PM0484D), City of Newark, which advised him that he was ineligible because he lacked permanent status in a title in the competitive division. Thus, there is simply no basis to find that the appellant ever attained permanent status in the titles of Sanitary Inspector or Lead Poisoning Inspector. In the absence of permanent status in a career service title, the Board lacks jurisdiction to

entertain the appeal of his removal, and he is not entitled to a hearing in accordance with *N.J.S.A.* 11A:2-6.

Finally, the Board notes that the appellant also relies on *N.J.S.A.* 26:3-26, which provides that “[n]o health officer, inspector or employee holding a license issued in the name of the State Department of Health, after five years’ consecutive service in the employ of a local board or regional health commission, shall be removed from office or reduced in pay or position except for just cause and after public hearing as provided in section 26:3-27 of this title.”<sup>3</sup> However, in the absence of an appeal that is properly before the Board, the Board lacks jurisdiction to interpret such statutes, which are outside the scope of Title 11A of the New Jersey Statutes Annotated, or determine the applicability of the cited statute or any purported violations. *Cf. Kowaluk v. Township of Middletown*, Docket No. A-4866-02T1 (App. Div. August 6, 2004); *Matter of Allen*, 262 *N.J. Super.* 438 (App. Div. 1993); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000).

## **ORDER**

Therefore, it is ordered that the appellant’s request for a hearing be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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<sup>3</sup> The Board also notes that it does not appear that this statute is applicable to the appellant. In this regard, *N.J.S.A.* 26:3-27 applies only to “[t]he local board or regional health commission, *not operating under the provisions of subtitle three, Title 11[A], Civil Service.*” (Emphasis added.)